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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 368

SHEET METAL WORKERS' INTERNATIONAL UNION, AFL-CIO, LOCAL UNION 17, *Petitioner,*

v.

AETNA STEEL PRODUCTS CORPORATION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 20, 1966.

CITATION TO OPINIONS BELOW

The opinion of the District Court (R.[1] 133-140), printed in Appendix B hereto, *infra,* p. 3a, is reported in 246 F. Supp. 236. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra,* p. 11a, is reported in 359 F. 2d 1.

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[1] Refers to Record Appendix filed by Petitioner in the Court of Appeals below.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 20, 1966. (R. 159). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether, pursuant to a national plan for settlement of jurisdictional disputes in the building and construction industry under which several lower boards of arbitration and an appellate arbitration board were established, an award of the appellate arbitration board is void when it exceeds the scope of the issues submitted to and adjudicated by the lower arbitration board.

STATUTE INVOLVED

The statutory provisions involved are Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. They are printed in Appendix A, *infra*, pp. 1a-2a.

STATEMENT

In the Spring of 1965, a jurisdictional dispute between the Sheet Metal Workers[2] and the Carpenters[3] occurred on a building project in Boston, Massachusetts, known as the John F. Kennedy Federal Office Building job. The general contractor, Bateson,[4]

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[2] Refers to Petitioner, Sheet Metal Workers' International Union, AFL-CIO, Local Union 17.

[3] Refers to Respondent, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union 33.

[4] Refers to Respondent, J. W. Bateson Co., Inc.

awarded a sub-contract to Aetna[5] to furnish labor, material, and equipment for the installation of certain items fabricated of sheet metal. (R. 4). Aetna assigned all of the work under its subcontract to employees represented by the Carpenters. (R. 4). The Sheet Metal Workers claimed that part of the work should have been assigned to employees represented by their union.

All parties involved in the dispute, i.e.: The Sheet Metal Workers, the Carpenters, Bateson, and Aetna, through affiliation with international labor organizations or contractors' associations, are participants in a private contractual Plan for Settling Jurisdictional Disputes Nationally and Locally, pursuant to the provisions of which jurisdictional disputes are to be resolved through arbitration. The text of the Plan, which was adopted on February 2, 1965, is printed in Appendix C, *infra,* p. 22a. The Plan provides for resolution of jurisdictional disputes initially by one of four arbitration boards. For the nation as a whole, a nine-man National Joint Board for Settlement of Jurisdictional Disputes was created. In three large metropolitan areas, New York, Chicago, and Boston, the National Joint Board had no jurisdiction, however, and local boards of adjustment which had been in existence prior to the adoption of the Plan continued to exercise exclusive arbitral authority over jurisdictional disputes in their respective areas. Decisions or Awards of the National Joint Board and the three recognized local boards were made subject to review before a newly created tribunal with appellate arbitration jurisdiction known as the Appeals Board.

---

[5] Refers to Respondent, Aetna Steel Products Corporation.

The Appeals Board was vested with authority under the Plan to prescribe rules as to the types of cases it would accept for review and, subject to approval by a committee of representatives of some of the signatory organizations, known as the Joint Negotiating Committee, to establish procedural regulations for the effective administration of the appeals procedure. (Appendix C, *infra,* p. 22a). In accordance with the authority granted under the Plan, the Appeals Board, on April 1, 1965, published a set of procedural Regulations the text of which is printed in Appendix D, *infra,* p. 32a. Regulation 1 provided in part:

> "An appeal may be filed from a job decision or a decision on a request for reconsideration, clarification or a decision following an oral hearing."

After Aetna made its disputed job assignment to the Carpenters, the Sheet Metal Workers filed a submission with the Boston Board on April 21, 1965, protesting "the employment of Carpenters, members of Local #33, on the installation of metal enclosures on metal venetian blinds pockets and convector covers." (R. 15). A hearing before the Boston Board, which the Carpenters did not attend, was held on April 27, 1965, and the following decision was issued:

> "The work in question, is the work of the Sheet Metal Workers." (R. 11, 17-18).

The Carpenters appealed the decision of the Boston Board to the Appeals Board on May 5, 1965, but the appeal was dismissed on the ground that it was not timely filed. (R. 6-7, 22-23). Aetna, thereafter, changed its work assignment in some respects, but not to the satisfaction of the Sheet Metal Workers.

This dispute over the correct interpretation or application of the Boston Board decision of April 27, 1965, led to a strike of the job site by the Sheet Metal Workers. (R. 8). While the strike was in process, the business manager of the Sheet Metal Workers, at the request of a representative of the general contractor, Bateson, went back to the Boston Board on July 20, 1965, accompanied by representatives of Bateson and Aetna, and asked for a clarification of the April 27 decision. The Boston Board, on the same day, issued a further decision stating:

> "All of the parties in interest be directed to comply with the April 27, 1965, decision of the Board." (R. 8-9, 23-24).

Aetna filed a timely appeal from the Boston Board decision of July 20, 1965, seeking clarification of the original April 27 decision. (R. 9, 24-25). The Carpenters joined in Aetna's appeal several days later and made the further request that the entire matter be reviewed by the Appeals Board for the purpose of eliminating problems and confusion created by the Boston Board and so this work may proceed without further interruption." (R. 9, 25-27).

The Appeals Board entertained Aetna's appeal, in which the Carpenters had joined and, on August 12, 1965, issued a decision in which it stated:

> "The Appeals Board in this decision has neither entertained an appeal from the decision of the Boston Board nor has it sought simply to interpret the decision of the Local Board of April 27 which the Local Board has refused to do. Some definitive action, however, is long overdue to determine how work shall proceed." (R. 32-33).

The Appeals Board then proceeded to make an entirely new work assignment as between the Sheet Metal Workers and the Carpenters, encompassing, in addition to the assignments placed in dispute by the Sheet Metal Workers in the April 27 submission to the Boston Board, items which neither the Sheet Metal Workers nor the Carpenters had submitted for arbitral resolution. The new work assignment made by the Appeals Board was as follows:

> "The unloading, distribution and installation of convector enclosures comprised of sills and front pieces and grills shall be assigned to the Sheet Metal Workers.
>
> "The unloading, distribution and installation of pipe enclosures, *curve window trim and base, filler pieces behind plaster columns,* venetian blind pockets, and *metal partitions* shall be assigned to the Carpenters." (R. 33). (Emphasis supplied.)

The Sheet Metal Workers protested the August 12 decision of the Appeals Board (R. 33-35) and a rehearing was granted on August 27, 1965. The decision on rehearing, issued on August 31, 1965, neither affirmed nor reversed the August 12 decision, and stated in conclusion:

> "The Appeals Board is anxious to have resolved by the Joint Negotiating Committee any question of its own authority, particularly during the formative period of its work. Accordingly, the Appeals Board requests that the Joint Negotiating Committee review the type of circumstances involved in the present situation and determine whether or not the Appeals Board may consider an appeal, once having declined to consider an appeal, in the face of subsequent developments of the sort outlined in the Factual Background above. The Appeals Board requests that the Joint

> Negotiating Committee make this determination at the earliest possible date." (R. 42).

The Joint Negotiating Committee to which the question "whether the Appeals Board may consider an appeal, once having declined to consider an appeal, in the face of subsequent development . . . ." was referred, has no authority under the Plan to interpret any Rules or Regulations promulgated by the Appeals Board or to revise any of its Rules or Regulations. Its sole authority over Appeals Board procedures is (1) to *approve* rules as to the types of cases the Appeals Board will accept for review and (2) to *approve* such procedural regulations as may be required for the effective administration of the appeals procedure. (Appendix C, *infra,* p. 27a).

The Sheet Metal Workers filed suit in the District Court on September 10, 1965, seeking confirmation of the Boston Board decision of April 27; vacation of the Appeals Board decision of August 12; and certain other relief not material to this Petition.

The District Court at the hearing on the Sheet Metal Workers' motion for a temporary injunction dismissed the complaint, apparently on the theory that it raised procedural questions, which, within the framework of the Plan, were to be determined by the Appeals Board itself or the Joint Negotiating Committee.

On appeal, the Court of Appeals affirmed the District Court, and, with respect to the issue raised in this Petition, held that inasmuch as the August 12 decision of the Appeals Board adjudicated issues that were within the scope of its general authority to review jurisdictional dispute decisions of the lower arbitration tribunals, it had the authority to resolve a

dispute "by using a broader lens than that provided by the parties", i.e.: by resolving issues not specifically submitted by the parties at the lower arbitration tribunal level. (Appendix B, p. 19a, *infra*).

REASONS FOR GRANTING THE WRIT

The decision of the court below has decided a federal question in a way in conflict with applicable decisions of this court in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593.

The August 12 decision of the Appeals Board awarded work assignments for the unloading, distribution, and installation of curve window trim and base, filler pieces behind plaster columns, and metal partitions when none of these items had been disputed or litigated before the Boston Board in the Sheet Metal Workers original submission on April 21, 1965, or at any other time. The Boston Board never had an opportunity to determine whether the work assignments referred to belonged to employees represented by the Sheet Metal Workers or the Carpenters or neither of them.

Article II, Section 5, of the Plan, which created the Appeals Board, provides that the Appeals Board "is empowered to review and decide any appeal from a decision or ruling of the National Joint Board or a Local Board recognized under Article IV (New York, Chicago and Boston)." The Appeals Board's own procedural regulations provide that appeals may be filed "from a job decision or a decision on a request for reconsideration, clarification, or a decision following an oral hearing."

The Appeals Board plainly can review or readjudicate on appeal claims presented at the National Joint Board or Local Board level, but it is equally clear that it has no jurisdiction under the Plan to Adjudicate claims that have never been asserted at the lower level. When the Appeals Board in its August 12 decision awarded work assignments over curve window trim and base, filler pieces behind plaster columns, and metal partitions, it plainly was attempting to act in the capacity of a tribunal of original jurisdiction rather than an appellate tribunal. This was openly conceded by the Appeals Board itself when in the decision of August 12 it stated that it "has neither entertained an appeal from the decision of the Boston Board nor has it sought simply to interpret the decision of the Local Board of April 27. . . ."

The Court of Appeals below agreed that the Appeals Board decision of August 12 dealt with issues not presented by the parties, but felt that this was proper in the circumstances, just as "appellate courts have power, on occasion, to note issues beyond those presented by the parties, in the interest of doing justice. . . ." (Appendix B, pp. 19a-20a, *infra*). It is submitted that this analysis is irreconcilable with pronouncements of this court.

In *United Steelworkers* v. *Enterprise Wheel & Car Co.*, 363 U.S. 593, 597, the court said;

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not set to dispense his own brand of industrial justice. . . . When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In *United Steelworkers* v. *Gulf & Warrior Nav. Co.*, 363 U.S. 574, 582, the Court indicated that it was always open to judicial inquiry whether the reluctant party, "did agree to give the arbitrator power to make the award he made", because:

> ". . . arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."

The federal judiciary is impressed with the duty under Section 301 of the Taft-Hartley Act to fashion a body of federal arbitration law "from the policy of our national labor laws." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457. There is no doubt that the national labor laws favor the settlement of private labor disputes through voluntary arbitration channels, and, as the Court made evident in *Wiley* v. *Livingston*, 376 U.S. 543, a claim must be submitted to arbitration if its arbitrability is at least arguably supportable.

The corollary to the proposition of encouraging the *submission* to arbitration of all but the most plainly non-arbitrable claims, however, is the doctrine articulated by this Court to the effect that awards rendered must be confined to the issues submitted by the parties in the arbitration agreement and in conformity with the general authority vested in the arbitrator thereunder. Any other rule would convert the arbitration process into a game of chance in which none of the parties would know until the award was rendered what rights and what issues would be determined. Such a state of affairs would be chaotic. It would lead to mistrust and, ultimately, to disuse of the arbitration process in labor disputes.

The holding of the Court of Appeals below with respect to the latitude permitted an arbitrator in the name of "creative adjustment" is irreconcilable with with the expression of this Court in the *American Mfg. Co.* and *Gulf & Warrior Navigation Co.* cases, *supra,* regarding the limitations on the power of labor arbitrators. Its erroneous ruling on this important issue should be corrected forthwith because federal courts in the First Circuit and other Circuits, as a result of the decision below, may, and probably will, fail to apply proper criteria in cases seeking to enforce or set aside labor arbitration awards, and, thus, fail to carry out the national labor policy respecting arbitration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes

THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, c. 120, 61 Stat. 156 § 185 Sec. 301 (29 U.S.C. 1965 ed. § 185):

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

DECLARATORY JUDGMENT ACT, c. 646, 62 Stat. 964
§ 1 (28 U.S.C. 1959 ed. § 2201)
§ 2 (28 U.S.C. 1959 ed. § 2202)

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139 § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12 (p), 72 Stat. 349.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

APPENDIX B

Opinion

CAFFREY, District Judge.

This is a suit for declaratory and other relief, brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the Declaratory Judgments Act, 28 U.S.C. § 2201 et seq., in which the plaintiff asks the Court to vacate an arbitration award. After a hearing on plaintiff's motion for a preliminary injunction, at which the matter was argued by counsel for all parties, it appears that the following facts are undisputed:

1. Defendant J. W. Bateson Co., Inc. is a corporation duly organized under the laws of the State of Texas and having a usual place of business in Massachusetts, where it is engaged in industry affecting commerce within the meaning of 29 U.S.C. § 152(7), as amended.

2. Defendant Aetna Steel Products Corporation is a corporation duly organized under the laws of the State of New York and having a usual place of business in Massachusetts, where it also is engaged in industry affecting commerce within the meaning of 29 U.S.C. § 152(7), as amended.

3. Defendant United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 33, is a labor organization representing employees in an industry affecting commerce within the meaning of 29 U.S.C. § 152(5).

4. Plaintiff Sheet Metal Workers International Union, AFL-CIO, Local Union No. 17, is a labor organization representing employees in an industry affecting commerce within the meaning of 29 U.S.C. § 152(5).

5. All of the parties in this case are affiliated with organizations that adopted and signed an agreement witnessed by

President Johnson at the White House on February 2, 1965. This agreement is entitled "Plan for National Joint Board for Settlement of Jurisdictional Disputes," and it provides for arbitration of disputes over work assignments in the construction industry.

6. Pursuant to Article IV of the Plan, the Local Board for the Adjustment of Jurisdictional Disputes for the Construction Industry of the Metropolitan District (Boston Board) is empowered to issue decisions resolving jurisdictional disputes on jobs or projects in the Boston area. These decisions are subject to review by an Appeals Board established under Article II, Section 2, of the Plan. The duties and powers of the Appeals Board are set out as follows in Article II, Section 5:

> "The Appeals Board is empowered to review and decide any appeal from a decision or ruling of * * * a local Board recognized under Article IV and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary and it is authorized, subject to the approval of the Joint Negotiating Committee, to prescribe rules as to the types of cases which it will accept for review. * * * The Appeals Board shall have the authority, subject to the approval of the Joint Negotiating Committee, to establish such procedural regulations as may be required for the effective administration of this appeals procedure."

Plaintiff asks the Court to declare null and void a decision of this Appeals Board rendered on August 12, 1965.

7. The events leading up to the commencement of this action are undisputed, though the parties differ in the interpretation to be placed on them. Bateson, which holds the general contract for construction of the John Fitzgerald Kennedy Federal Office Building in Boston, awarded to Aetna a subcontract to furnish labor, materials and equip-

ment for certain work on the job. Aetna made a written assignment to Carpenters of the installation of all items included in the subcontract on February 17, 1965. On April 21, 1965 the Sheet Metal Workers filed a protest of Aetna's work assignment with the Boston Board. After notice to all parties the Boston Board held a hearing on Tuesday, April 27, 1965 which was attended by all parties except the Carpenters. On the same day the Board issued a decision awardng a certain portion of the work to the Sheet Metal Workers.

8. By telegram dated May 4, 1965 Carpenters appealed the decison to the Appeals Board. The Appeals Board, however, rejected the appeal as untimely under its procedural regulations, which provided that any request to consider an appeal must be filed with the Appeals Board no later than two working days after the date of the decision.

9. Thereafter, a dispute arose over Aetna's reassignment of the work on its subcontract. Contending that Aetna had not given the Sheet Metal Workers all the work awarded to them by the Boston Board decision, the Sheet Metal Workers went on strike on July 15, 1965. Five days later, while the strike was still in progress, plaintiff's business manager, Joseph Connelly, accompanied by representatives of Aetna and Bateson, appeared before the Boston Board and verbally requested a clarification of the April 27th decision. On the same day, July 20th, after meeting in executive session, the Boston Board issued a decision stating, "All of the parties in interest be directed to comply with the April 27, 1965 decision of the Board." The Carpenters were not notified of this hearing and no representative appeared for them.

10. Under the procedural regulations of the Appeals Board in effect at the time, an appeal could be filed from "a job decision or a decision on a request for reconsideration, clarification or a decision following an oral hearing." Aetna filed an appeal from the July 20th decision of the

Boston Board by telegram on July 22, 1965, requesting that the Appeals Board clarify the April 27, 1965 decision. Carpenters joined in this appeal by telegram dated July 26, 1965 and, in addition, requested that "this entire matter be reviewed by the Appeals Board for the purpose of eliminating problems and confusion created by the Boston Board and so that work may proceed without further interruption."

11. Meanwhile, the strike spread as other unions stopped work in support of the Sheet Metal Workers. Picket lines were established. The National Labor Relations Board also became involved, and contacted the Appeals Board urging resolution of the dispute in the industry. The work stoppage finally ended on July 27, 1965 when Bateson took over the work of the subcontractor and entered into an agreement with the Sheet Metal Workers. This agreement by its terms was effective only until "such time as a recognized court, the * * * (Boston Board), or the national Appeals Board reverses our order."

12. Against this background, after a hearing attended by all parties, the Appeals Board handed down the August 12, 1965 decision which is challenged here. In that decision, after stating that it had neither entertained an appeal from the April 27, 1965 decision of the Boston Board nor sought simply to interpret that decision, the Appeals Board noted that some definitive action was long overdue and unanimously made a determination of how work should henceforth proceed on the project. Under this determination the Sheet Metal Workers lost some of the items of work that had been awarded to them by the April 27th decision and which they had been performing under the July 27, 1965 agreement with Bateson.

13. Although no procedural provision for reconsideration of an Appeals Board decision was contained in its procedural regulations, the Appeals Board held a hearing on a protest by the Sheet Metal Workers who claimed that the

Appeals Board had no jurisdiction over the question of the right to install items of work covered by the Boston Board decision. On August 31, 1965 the Appeals Board handed down a seven-page decision which contained a detailed summary of events leading up to its August 12th decision. After reviewing the objections of the Sheet Metal Workers and noting the provisions of the plan upon which it apparently relied for its power to make the August 12th decision, the Appeals Board concluded that it was "anxious to have resolved by the Joint Negotiating Committee any question of its own authority, particularly during the formative period of its work." "Accordingly," the Board continued, "the Appeals Board requests that the Joint Negotiating Committee review the type of circumstances involved in the present situation and determine whether or not the Appeals Board may consider an appeal once having declined to consider an appeal, in the face of subsequent developments of the sort outlined in the Factual Background."

14. Without waiting for the Joint Negotiating Committee to hand down a decision (which still has not been done as far as this record indicates), Sheet Metal Workers filed the instant complaint on September 10, 1965 seeking declaratory relief as to (1) the validity of the Appeals Board decision of August 12th, (2) the validity of the Boston Board decision of April 27th, and (3) the validity and viability of the July 27th agreement between plaintiff and Bateson; money damages; and permanent injunctive relief against Aetna, Bateson, and Carpenters.

The suit is within the jurisdiction of this court under Section 301 of the Act, 29 U.S.C. § 185. Defendants' contention, that since this dispute involves a work assignment it is within the exclusive jurisdiction of the National Labor Relations Board, is without merit. The Supreme Court's decision in Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320 (1964) established that this type of labor dispute is a proper subject for arbitra-

tion. Here the parties have entered into an agreement for the specific purpose of providing for such arbitration. Authority to compel arbitration (Carey v. Westinghouse, supra) carries with it authority to enforce or vacate an award by the arbitrator. A. L. Kornman Co. v. Amalgamated Clothing Workers, 264 F. 2d 733 (6th Cir. 1959), cert. denied 361 U.S. 819, 80 S. Ct. 62, 4 L. Ed. 2d 64 (1959). And the possibility of conflict is no barrier to resort to a tribunal other than the Board. Smith v. Evening News Ass'n, 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962).

Defendants, in moving to dismiss the complaint, argue that it is premature since plaintiff has not exhausted its contractual remedies. More specifically, they contend that until the Joint Negotiating Committee takes some action there is no way of telling whether the plainiff is entitled to relief from the court because the Committee may well grant plaintiff the relief it now requests. On the other hand, plaintiff argues that the Joint Negotiating Committee has no power to reverse Appeals Board decisions; that its approval or disapproval of Board rules only operates *in futuro;* that only the Appeals Board has access to the Committee; and that therefore plaintiff had exhausted its remedies under the plan and its resort to the court was proper.

Plaintiff's argument on prematurity points up another issue present in this case which, though intertwined with the question of prematurity, raises not only the further question of the propriety of court intervention in the dispute at *this* time but, also, a question of the propriety of court intervention in the dispute at *any* time. That issue is whether the parties have entrusted by contractual agreemen the subject matter of this complaint to someone other than the court and, if so, whether the court will give effect to such an entrustment.

Plaintiff's main contention on the merits is that the August 12, 1965 decision of the Appeals Board is null and

void because the Board exceeded its jurisdiction under the Plan. There can be no question of "substantive arbitrability" here; the disputed work assignment was precisely the type of dispute that the parties agreed to submit to arbitration under the Plan. Plaintiff, however, contends that the Appeal Board's own procedural regulations prevented it from making the decision it did. Plaintiff points to no express provision which says this in so many words. Rather, plaintiff argues that there was no provision in the rules which authorized the Board to make the decision it did. On the basis of this lack of express provision, plus plaintiff's interpretation of some of the provisions of the Plan that, at the very least, is open to doubt, and plaintiff's unsupported allegations of what the parties intended when they signed the plan, this Court is asked to substitute its judgment for that of the arbitrators. If it were to do so, the Court must necessarily decide the questions about the authority of the Joint Negotiating Committee which the plaintiff raises in its argument on prematurity.

The mere recital of the plaintiff's claims militates against upholding them. The spectacle of this Court thrusting itself into the arbitration process in such a manner is alien to the fundamental concepts underlying our national labor policy. To do so would emasculate the arbitration process, which the Steelworkers trilogy (United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)) teaches us is the cornerstone of that policy. There can be no doubt that if the Court took it upon itself to interfere in this dispute, the attempt to settle work assignment dispute in the construction industry by means of an arbitration agreement would soon be abandoned. An agree-

ment entered into so hopefully at the White House last February and put into effect last April is entitled to a better opportunity to prove its worth in the industry.

An examination of the Plan shows that it expressly authorizes the Appeals Board, in the exercise of its discretionary jurisdiction, to prescribe rules as to the types of cases which it will accept for review, and to establish procedural regulations for the effective administration of the appeals procedure. (Plaintiff's Exhibit 2, Article II, Sec. 5.) The rules established by the Board are subject to the approval of the Joint Negotiating Committee. (Plaintiff's Exhibit 2, Article II, Sec. 5.)

It appears, then, that the parties have provided in their agreement for administrative decision of the very question which plaintiff now asks the Court to determine; and, as they were free to do under our national labor policy, the parties chose to have these questions decided in the arbitration process, without the aid—or interference—of the courts. The Supreme Court recently held, in John Wiley & Sons v. Livingston, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964), that when the parties have agreed to submit a dispute to arbitration "procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." In the present case the parties provided for this result by contract. As indicated above, there are compelling reasons for giving effect to this agreement, and accordingly the complaint is dismissed.

Opinion

Before ALDRICH, Chief Judge, and MCENTEE and COFFIN, Circuit Judges.

COFFIN, Circuit Judge.

This is an action, brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., in which the plaintiff union (Sheet Metal)[1] seeks damages and a decree invalidating and enjoining enforcement of an arbitration award arising out of a jurisdictional dispute with defendant union (Carpenters). The dispute concerns construction work on the John Fitzgerald Kennedy Federal Office Building in Boston. Bateson is the general contractor and Aetna has a subcontract to install certain prefabricated and enamelled sheet metal enclosures surrounding window interiors.[2] The appeal is from a decision of the district court dismissing the complaint on the ground that the parties have provided for arbitration machinery to resolve the points at issue and that it is not for the court to interfere in what are essentially procedural questions to be resolved pursuant to the method agreed upon by the parties.

The seeds of dispute lie in the changing technology of building construction. Interior window trim and panelling

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[1] Sheet Metal Workers International Association, AFL-CIO, Local Union No. 17. Defendants are: United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 33 (Carpenters); J. W. Bateson Co., Inc. (Bateson); and Aetna Steel Products Corporation (Aetna).

[2] The three items principally disputed over are (1) a convector cover with grilled facing which occupies the space between window sill and floor; (2) pipe or air induction covers, which cover wall ducts running between windows and also serve as window trim; and (3) metal facings at the top of windows covering pockets for the insertion of venetian blind fixtures. Assembled, the three items fully frame a window.

were formerly of wood, had to be fitted and joined on the premises, and were therefore traditionally the domain of carpenters. But with the wider use of prefabricated metal, the skills and claims of sheet metal workers have entered the scene.[3] Aetna, the subcontractor, acting in accordance with its prior practice on jobs in six other states and the District of Columbia and in what it claimed was conformity to the tradition established by the 1928 inter-union agreement (see note 3, supra), assigned to Carpenters "all moveable steel partitions, convector covers, pipe covers, and related interior work around windows * * * for installation." On the other hand, Sheet Metal claimed that there had been a custom in the Boston area for convector covers and venetian blind pockets to be given to sheet metal workers (with no past area experience as to air induction covers, apparently a new item).

From these seeds sprouted a vine of controversy, running through all levels of the newly established arbitration machinery set up to deal with jurisdictional disputes in the construction industry. This machinery is set forth in the "Plan for National Joint Board for Settlement of Jurisdictional Disputes", an agreement between organizations representing the national building trades unions and building contractors, executed at the White House, and witnessed by the President on February 2, 1965. The Plan utilizes preexisting "Local Boards" for adjusting jurisdictional

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[3] A 1928 jurisdictional agreement between Carpenters and Sheet Metal, still in effect, attempted to deal with this problem in allocating "all interior metal trim" to Carpenters, but apparently reserving metal trim made by certain sheet metal manufacturers for Sheet Metal. It also specified under what circumstances metal window frames would be set by each union. The agreement provided that in the event of a misunderstanding arising in carrying out the provisions, the two General Presidents would consult. This consultation apparently did not take place in this case but there is no averment that such omission affects the rights of the parties before us.

disputes (in Boston, Chicago, and New York), establishes a National Joint Board for the Settlement of Jurisdictional Disputes, and creates an Appeals Board to decide appeals from both Local Boards and the Joint Board. It is empowered to prescribe rules and regulations subject to the approval of the Joint Negotiating Committee (representing the signatory organizations). The agreement took effect on April 1, 1965, by which time preliminary regulations for the operation of the Appeals Board had been established.[4]

Notwithstanding this framework designed to expedite orderly resolution of problems of jurisdiction, each step taken by the parties widened the area of controversy. The following chronology is the only matter not in dispute.

1. Sheet Metal, hearing of Aetna's assignment of interior metal window work to Carpenters, after an abortive effort

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[4] The Procedural Regulations are prefaced by the acknowledgment that:

> "The Appeals Board cannot anticipate at the outset of its operations the full range of procedural questions that may arise in carrying out its functions under the revised plan for the settlement of jurisdictional disputes. * * * "

The Regulations, contained, in part, the following:

> " * * * The rejection of the consideration of an appeal by the Appeals Board is not to be construed as constituting any ruling on the merits of a dispute nor does it prejudice a further request for consideration of an appeal on a similar case in the future. * * * "
>
> " * * * In exercising its discretion as to whether or not to accept a particular appeal, the Appeals Board will give consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolution of disputes and the improvement of relations, and the reasons advanced for considering the appeal. * * * "
>
> " * * * The decision of the Appeals Board shall be communicated to all involved parties; its decision shall be complied with at once. * * * "

For other references to the Regulations, see notes 5 and 6, infra.

to communicate with Carpenters, filed a protest with the Local Board in Boston. The protest cited only "The installation of metal enclosures on metal Venetian blinds pockets and convector covers."

2. Hearing was held on April 27, 1965. All parties except Carpenters (apparently having withdrawn, along with some other craft unions, from the Boston Board) were present. Sheet Metal, although it had listed only the "installation" of two items in its protest, allegedly made clear by pictures and a mockup model that it was claiming all three items described in note 2, supra. The Boston Board's laconic decision of April 27 was: "The work in question is the work of the Sheet Metal Workers."

3. Carpenters, alleging a delay in the mails, appealed the Boston Board decision to the Appeals Board seven days later. Sheet Metal objected that the appeal was untimely, not being within the two days set forth in Appeals Board regulations. The Appeals Board accordingly refused to consider it.

4. On July 2 Aetna notified Sheet Metal that it was complying with the April 27 decision by assigning installation of "metal enclosures on metal venetian blinds pockets and convector covers" to Sheet Metal. It was assigning installation of pipe covers (or air induction covers) and the unloading and distribution of all three items to Carpenters. This assignment literally complied with the wording of both Sheet Metal's initial protest and the Boston Board's order. (Aetna, in effect, was playing Portia to Sheet Metal's Shylock.) Sheet Metal, however, claimed this violated uniform custom that "handling" materials was included in "installation" and that it had been made clear that three items, not two, were in dispute.

5. Sheet Metal went on strike on July 15. The business manager of Sheet Metal, at the request of Bateson, went back to the Boston Board on July 20, orally requesting clarification of the April 27 decision. No notice of this

meeting was given Carpenters. The Board heard Sheet Metal, Aetna, and Bateson. It thereupon issued another Delphic decision that: "All of the parties in interest be directed to comply with the April 27, 1965 decision of the Board."

6. On this occasion there was a timely appeal to the Appeals Board by Aetna,[5] calling attention to the continuing work stoppage and the ambiguity of the July 20 decision. Carpenters joined, urging that "this entire matter" be reviewed to eliminate confusion. Sheet Metal questioned the right of the Appeals Board to intervene at all, and cited as the only area of contention the question whether "handling" of items is automatically included with assignment of installation.

7. Shortly thereafter, Bateson, to resolve the strike, made a written agreement with Sheet Metal to assign all the disputed work to it until the order of the Boston Board was reversed by a court, the Boston Board, or the Appeals Board.

8. After hearing all parties, the Appeals Board issued a decision on August 12 which, after reciting the "confused situation" resulting from the refusal of the Boston Board to clarify its earlier decision and to give guidance to the contractors, the work stoppage, the intervention of the National Labor Relations Board, and the "strained" interpretation which Aetna had given the April 27 decision, took the jurisdictional bull by the horns. Saying that "some definitive action * * * is long overdue to determine precisely how work shall proceed", it decided:

> "The unloading, distribution and installation of convector enclosures comprised of sills and front pieces and grills shall be assigned to the sheet metal workers.

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[5] Appeals Board Procedural Regulations provide that "An appeal may be filed from a job decision or a decision on a request for reconsideration, clarification or a decision following an oral hearing. * * *"

"The unloading, distribution and installation of pipe enclosures, curve window trim and base, filler pieces behind plastered columns, venetian blind pockets and metal partitions shall be assigned to the carpenters."

9. While this was a decision of the Appeals Board which by regulation was to "be complied with at once", Sheet Metal protested that the Appeals Board had jurisdiction only to decide whether the right to install items carried with it the right to unload and distribute them. Notwithstanding the absence of "protest" procedure after decision, the Appeals Board held another hearing on August 27 and rehearsed the entire history. While observing that "the unhappy events affecting this project in July clearly required some firm resolution", it urged that the Joint Negotiating Committee "review the type of circumstances involved" to clarify during this "formative period" the authority of the Appeals Board to consider an appeal having once declined to act, "in the face of subsequent developments of the sort" which had been faced in this case.

Plaintiff, Sheet Metal, argues that nothing done by the Appeals Board has validity because (1) it attempted to decide matters beyond the precise controversy referred to it; (2) having refused to take the first appeal, it was barred from rehearing the issue on the appeal from the "clarifying" decision; and (3) in any event its decision of August 12 was not final, being contingent on future deliberations of the Joint Negotiating Committee, and therefore the April 27 decision of the Boston Board should continue in effect.[6]

We do not agree. We have set forth the tortuous history of this controversy at some length partly to indicate the inappropriateness of an excessively legalistic approach to

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[6] The Appeals Board's Procedural Regulations provide that a local board's decision shall be placed in effect, notwithstanding a request for consideration of an appeal, until such time as there is a decision by the Appeals Board.

the technical and pragmatic problems of arriving at fair and workable jurisdictional solutions. For example, Sheet Metal, which invoked the arbitral apparatus without any exploratory consultations with Carpenters, was embarrassed by a protest phrased too narowly. The posture of Carpenters in pretending that the Boston Board did not exist was hardly conducive to constructive arbitration. While Sheet Metal was quick to foreclose an appeal several days overdue, it nevertheless was offended by an obviously "strained" reading of the April 27 decision by Aetna. Without probing other approaches, it resorted to a strike. Then, after going back to the Boston Board and opening the door to appeal, by requesting clarification, it tried to shut it once again as to all issues except one where it had nothing to lose. After the decision of August 12, the first thoughtful attempt to deal with the problem, it went outside all procedure, protested the decision, and obtained another hearing.

Our approach to this tangled web is based on the assumption that no longer in the building industry should jurisdictional problems be approached like common law pleading. We prefer to base our decision on what seem to us to be a necessary respect of and tolerance for the arbitration process.

It need hardly be stated that national policy strongly favors arbitration in labor disputes. The "Steelworkers Trilogy" clearly sets the tone. In United Steelworkers of America v. American Mfg. Co., 1960, 363 U.S. 564, 567, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403, the Supreme Court, criticizing the lower courts for their "preoccupation with ordinary contract law" compelled the submission to arbitration of even a possibly frivolous claim. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, the Court required the company to go to arbitration on its action in contracting out maintenance work despite a provision

excepting from arbitration matters which were "strictly a function of management". The Court referred to a collective bargaining agreement as "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." 363 U.S. at 578, 80 S.Ct. at 1351. It added: "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." 363 U.S. at 581, 80 S.Ct. at 1352.

In describing the scope of judicial review, the Court stated that inquiry "* * * must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." 363 U.S. at 582, 80 S.Ct. at 1353. The Court stated the restriction in another way in United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424: "When the arbitrator's words manifest an infidelity to this obligation [the collective bargaining agreement], courts have no choice but to refuse enforcement of the award."

We may observe that if such force is to be given to collective bargaining agreements between management and unions, no less support should be given agreements to which unions resort to resolve their jurisdictional disputes. There is no question here but that the dispute falls within the kinds of controversy envisaged.

Whether "handling" should accompany "installation"; whether metal enclosures on venetian blind pockets are one or two items; whether convector covers, venetian blind pockets, and air induction covers are indivisible or not; how, if divisible, they should be allocated—these are matters best handled by those acquainted with "the common law of the shop". The issue is whether, arbitration having

aborted at the local level—with blame enough to be shared by all, the Appeals Board's decision should be declared a nullity for reasons of rejection of a prior appeal, scope of matters considered, and a request to the Joint Committee for guidance for this type of problem.

We are reluctant to appear to preempt the responsibilities of both the Appeals Board and the Joint Negotiating Committee. We therefore will not say that, when the regulations allow an appeal from a decision on a request for "clarification", the Appeals Board is beyond the bounds of arbitrability in considering it. Sheet Metal cites the provision (see note 4, supra) saying that denial of an appeal does not foreclose an appeal "on a similar case in the future." From this, it concludes that an appeal is foreclosed on the same case in the present. But to say that because the Appeals Board will hear similar cases in the future, it will not entertain appeals from decisions on requests for reconsideration or clarification is to construe two regulations as having an internal inconsistency. Whatever the merits, it is clear that this is the kind of procedural question which should be left to the arbitrator (or, in this case, the system of arbitration) to decide. John Wiley & Sons, Inc. v. Livington, 1964, 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898.

Neither will we say that the Appeals Board was guilty of "infidelity" or abuse of power in trying to resolve a dispute by using a broader lens than that provided by the parties. If the purpose of the Appeals Board is to resolve disputes and improve relations between unions, we cannot deny it at least the same room for creative adjustment which an arbitrator between management and labor possesses.[7] Even appellate courts have power, on occasion,

[7] Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1499 (1959): "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional

to note issues beyond those presented by the parties, in the interest of doing justice, e. g., Fed.R.Civ.P. 52. A fortiori, we should not impose a narrowed latitude on what should be a broader-ranging search for a workable result. On a matter no less important to the parties we have said, "Questions of arbitrability are not automatically resolved in the employer's favor by invoking the term 'jurisdiction'. * * * Arbitrators, however, even as courts, Fauntleroy v. Lum, 1908, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039, have 'jurisdiction' to decide erroneously." Trailways of New England, Inc. v. Amalgamated Association, 1 Cir., 1965, 353 F.2d 180, 182.

The final argument against the validity of the Appeals Board decision is that, while it appeared to be final on August 12, any vestige of finality was removed by the subsequent reference to the Joint Negotiating Committee. Sheet Metal draws from this "state of suspended animation" the conclusion that it is entitled to have the Boston Board decision of April 27 complied with and the agreement with Bateson reactivated at least until such time "as a *bona fide* final decision is issued".

We have some sympathy with Sheet Metal on this point, for the Appeals Board has not made it crystal clear what it considers to be the state of its decision. Acting in obvious good faith it has sought to build confidence in its future operations by asking policy guidance for its action in "the type of circumstances involved in the present situation," so that any question of its authority be resolved. It would we think, have been better practice to have made more

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characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words." In the case before us, the procedures governing the processing of appeals by the Appeals Board, covering the building trades unions of the country, fill six pages of a vest pocket booklet.

clear the distinction between deciding a case before it and devising rules and procedures to cover anticipated situations in the future.

The key to the answer, however, has been supplied by the cogent arguments of Sheet Metal itself. For counsel has pointed out that the Joint Negotiating Committee's authority is described as approving rules as to types of cases accepted for review and procedural regulations, not as interpreting or revising rules on its own initiative. We might add that, if the August 12 decision is to be considered a nullity, every case of first impression may well go unresolved. For if the Appeals Board cannot dispose of such a case, absent prior rule, it is all the more clear that a rule subsequently devised cannot operate retroactively. Such an approach would be well calculated to insure the demise of the "Plan". It is hard to believe that the signatory parties and unions represented would want their new system so reduced to impotency. On the other hand, the habit of going to court to test the propriety of every unprecedented or unforeseen step taken at any level in the arbitration system would "* * * entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties * * * and contrary to the aims of national labor policy". John Wiley & Sons, Inc. v. Livingston, supra, 376 U.S. at 558, 84 S.Ct. at 919.

Whatever may flow from the deliberations of the Joint Negotiating Committee, we think it clear that the Appeals Board decision of August 27 is the significant operative fact. It has not been revoked. It cannot be reversed by the Joint Negotiating Committee. At most the consultations may produce another decision, just as an appellate court occasionally reconsiders and changes its decisions. To be sure, if a different result ultimately ensues, there will have been much inconvenience suffered in the meantime, but no more so than granting Sheet Metal's request now, only to see the August 27 result reconfirmed at a later date.

We affirm the action of the district court in dismissing the complaint on the ground that "the parties have provided in their agreement for administrative decision of the very question which plaintiff now asks the Court to determine". But we have felt it necessary to examine the present status of the August 12 decision, for a decision buttressed solely on respect for the arbitration process not yet completed might be read as indicating that the Appeals Board decision was of no effect, and that the earlier Boston Board decision should be carried out. In other words, we have intervened only to support the arbitral jurisdiction.

The dismissal of the complaint must be affirmed for the reasons given in this opinion.

APPENDIX C

PLAN FOR NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES

In consideration of the mutual promises and covenants herein contained, it is agreed by and between the parties hereto as follows:

ARTICLE I

Sec. 1. *Effective Date.*—This agreement, as amended, shall take effect on April 1, 1965, and shall remain in force and effect until March 31, 1966, and shall continue in effect for each year thereafter unless terminated as provided for herein. Changes or amendments to this agreement may be made as provided for herein.

Sec. 2. Any party signatory to this agreement desiring to change or terminate this agreement shall notify the other party in writing at least ninety (90) days prior to the 31st day of March of any year subsequent to 1965.

When notice for change is given, the nature of the changes desired must be specified in the notice. This agreement shall be subject to change at any time by mutual consent of the parties hereto. Any changes agreed upon shall be reduced to writing and signed by the parties hereto, the same as this agreement.

Article II

Sec. 1. *Joint Board.*—There shall be established a National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry.

This Board shall consist of an impartial chairman, two regular and two alternate Labor Members appointed by the Executive Council of the Department. One of each shall be appointed from among the basic trades and one of each shall be appointed from among the specialty trades, and two regular and two alternate employer members, one of each shall be representatives of and selected by the participating national association of general contractors of the industry and one of each representing and selected by the participating national associations of specialty contractors in the construction industry.

It is understood such employer representatives shall consist solely of contractor members, officers of member contracting firms or qualified association staff members who have had experience and are actively engaged in the building and construction industry.

No regular or alternate member of the Joint Board shall participate in any case where the trade union or company of which he is an officer or representative is a party to the dispute. In the event that both a regular member and his alternate are disqualified from participation in a case by reason of the limitation expressed in the preceding sentence, the executive head or other designated representative of the department or the particular association group party

to this Plan shall designate an appropriate substitute member from the eligible group to participate in the decision of the case.

The full-time officers of the Department shall be available for advice and consultation but they shall not be eligible for appointment to the Joint Board.

There shall be no proxy votes.

The Labor Members of the Board shall hold office for one (1) year and shall be appointed by the Executive Council annually at the first quarterly meeting of each year.

The joint negotiating committees representing the Building and Construction Trades Department and The Associated General Contractors of America, Inc., and the National Participating Specialty Contractors' Associations shall have the duty of selecting the Chairman of the National Joint Board and the Impartial Umpire of the hearings panel and Appeals Board.

The Chairman of the National Joint Board shall be bonded and made responsible for disbursement of the Board's funds, shall keep the books of the Board and submit to the parties to the agreement a quarterly financial statement; shall provide for an annual audit of the books by a certified public accountant and shall prepare annually a proposed budget of the necessary expenses of the Board for the following twelve (12) months and submit same to the joint negotiating committee for approval. The total amount of the budget, when approved, shall be subscribed annually in advance 50 per cent by the Building and Construction Trades Department, AFL-CIO, and 50 per cent by the participating national associations of employers signatory to this agreement. All expenditures shall be within the approved budget.

In negotiating national agreements between international unions, consultation with the appropriate management

groups on the making of agreements between international unions is desirable and should be carried on.

National agreements entered into and properly signed by disputing international unions, other than those provided for in Article III, Section 2, shall be filed with the National Joint Board and attested by the Chairman.

Joint Board Rules and Regulations.—The Chairman and Joint Board shall have the authority to establish such procedural regulations and administrative practices as may be required for the effective administration of this agreement, with the approval of the Joint Negotiating Committee, provided such regulations and practices are consistent with the expressed terms of this agreement.

The Joint Negotiating Committee shall have the power to revise the procedural regulations and administrative practices of the Joint Board.

Sec. 2. *Appeals Board.*—There shall also be established an Appeals Board consisting of an Impartial Umpire appointed by the Joint Negotiating Committee, two regular and two alternate labor members appointed by the Executive Council of the Department from the General Presidents of the national and international unions affiliated with the Department, or elected general officers of national or international unions designated by their respective General Presidents, and one regular and one alternate employer member appointed by each of the two participating national employer association groups. It is understood such employer representatives shall consist solely of contractor members, or officers of member contracting firms who have had experience, and are actively engaged, in the building and construction industry. The Executive Council shall select one regular and one alternate Labor Member from the basic trades and one regular and one alternate Labor Member from the specialty trades. No regular or alternate member of the Appeals Board shall

participate in any appeal where the trade union or company of which he is an officer or representative is a party to the dispute. In the event that both a regular member and his alternate are disqualified from participation in an appeal by reason of the limitation expressed in the preceding sentence, the executive head or other designated representative of the Department or the particular Association group party to this Plan shall designate an appropriate substitute member from the eligible group to participate in the decision of the appeal.

The Members of the Appeals Board shall hold office for one (1) year and shall be appointed by the designated appointing agency annually except that where a vacancy occurs during an unexpired term of office the appointing power can be exercised at the time such vacancy occurs.

The commitments of the Department and the national participating employers association groups with respect to the subscription of funds of the National Joint Board shall also apply equally to the Appeals Board. The expenses of the Appeals Board shall be limited to actual expenses and per diem allowances of the Impartial Umpire which shall be disbursed from the budgeted funds of the National Joint Board.

Sec. 3. It is understood that in signing this agreement the parties agree to bear their appropriate share of the Joint Board's expense and to furnish their representatives on the Joint Board and Hearings Panels hereinafter provided for in this agreement.

Sec. 4. It shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by any of the International Unions involved in the dispute, or an employer directly affected by the dispute on the work in which he is engaged or by a participating organization representing such employer.

Sec. 5. The Appeals Board is empowered to review and decide any appeal from a decision or ruling of the National Joint Board or a Local Board recognized under Article IV and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary and it is authorized, subject to the approval of the Joint Negotiating Committee, to prescribe rules as to the types of cases which it will accept for review. No decision of the Appeals Board shall be considered as part of the record referred to in Article III, Sec. 1(d) of this Plan. The Appeals Board shall have the authority, subject to the approval of the Joint Negotiating Committee, to establish such procedural regulations as may be required for the effective administration of this appeals procedure. A quorum of the Appeals Board shall require four regular or alternate members (one each from the basic trades, the specialty trades, and the two participating national employer association groups). In the event of a tie vote, the Impartial Umpire shall cast the deciding vote.

Article III

Sec. 1. (a) In making a job decision the Joint Board shall utilize the following criteria: Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality.

(b) The Joint Board may at its discretion hold oral hearings on repetitive disputes for the purpose of rendering a decision applying in the locality as defined by the Board.

(c) All agreements and decisions recognized under the provisions of the Constitution of the Building and Construction Trades Department shall be considered as constituting the record.

(d) Any job decision or ruling rendered by the Joint Board under paragraph (b) of this section may be appealed to a Hearings Panel by any of the participating National or International Unions involved or may be referred to a Hearings Panel for a national decision by action of the Joint Board. Any decision rendered by such a Hearings Panel shall immediately become part of the record referred to in paragraph (c) of this section.

(e) In jurisdictional dispute cases where International Unions, members of the Building and Construction Trades Department, AFL-CIO, and participating or stipulated employer national associations, do not have direct representation on the Board hearing a specific case, they may designate a representative to participate in the discussion of such case.

(f) The Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes, but should give due regard to such factors as efficiency and economy of operation.

Sec. 2. *Hearings Panels-National Decisions.*—When a dispute is filed with the Appeals Board by a National or an International Union, with a specific request for a decision on a national basis which would become part of the record, the Board shall review the request, and if the Board finds it is an issue not already determined on a national basis by a decision or agreement of record, it shall refer the issue to the Impartial Umpire who shall call a conference of the General Presidents of the Unions involved for the purpose of determining whether or not a national agreement is possible. If an agreement is concluded and properly signed by the contesting parties and attested by the Impartial Umpire, the terms and provisions of the agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event that the dispute cannot be settled by agreement or is not settled by agreement at the end of six months, the

Impartial Umpire shall docket the case for hearing and decision by a hearings panel as provided below.

Sec. 3. In any case to go to a hearings panel, the Impartial Umpire shall notify all General Presidents of National and International Unions affiliated with the Building and Construction Trades Department and national participating employers' association, stating the controversy to be considered and shall allow all parties interested to intervene. Thirty days' notice shall be given of the date set for the hearing. Briefs shall be submitted and exchanged by all parties to the dispute at least ten days prior to the hearing date.

Sec. 4. A hearings panel shall be composed of two disinterested General Presidents appointed by the Executive Council of the Department and two disinterested contractor representatives, one appointed by The Associated General Contractors of America, Inc., and one appointed by the national participating specialty contractor associations, together with the Impartial Umpire.

Sec. 5. The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision.

Sec. 6. In the event any party to a dispute fails to present their case within the stated time, the Joint Board, the Appeals Board, and Hearings Panel shall, nevertheless proceed with the case and make its decision on the basis of the evidence presented.

Sec. 7. *Making Decisions.*—The Hearings Panel shall in every instance consider all pertinent evidence and shall render a decision if possible, within ten (10) days after the conclusion of the hearings. Copies of the Hearings

Panel decision shall be sent to all parties signatory to this agreement.

Decisions of the Hearings Panel are not appealable to the Appeals Board and shall be immediately accepted and complied with by all parties to this Agreement. Any decision or interpretation by the Joint Board shall be immediately accepted and complied with by all parties subject to this Agreement unless an appeal is taken to the Appeals Board. In such event, the decision or interpretation of the Appeals Board shall be immediately accepted and complied with by all parties to this Agreement, when such decision or interpretation has been rendered.

It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement.

ARTICLE IV

Sec. 1. *Local Settlements.*—In any community or locality where a plan for the settlement of jurisdictional disputes which has been recognized by the Building and Construction Trades Department now exists, it shall be used in the first instance to bring about an agreement or settlement or decision. However, any such local settlement or agreement or decision shall only apply to the particular job in question, and an appeal therefrom may be taken directly to the Appeals Board by any of the parties involved.

ARTICLE V

Sec. 1. *Continuance of Work.*—Pending a decision by the Board or such settlement as may be arrived at through the office of the Chairman of the Joint Board, there shall be no stoppage of work rising out of any jurisdictional dispute.

Members of organizations affiliated with the Building and Construction Trades Department shall continue to work on the basis of their original assignment, provided the employer has not assigned employes to perform work contrary to decisions or agreements of record or the procedural rules of the Board.

ARTICLE VI

Sec. 1. It is the sense of the parties hereto that the members and Chairman of the Joint Board shall tender to the National Labor Relations Board their services as expert witnesses in any hearing held by the Board under the provisions of Section 10 (k) of the National Labor Relations Act as amended, and that no fees shall be charged for such service beyond the statutory witness fees and mileage allowance.

Signed for the Building and Construction Trades Department, AFL-CIO:

FRANK BONADIO,
Secretary-Treasurer.

CORNELIUS J. HAGGERTY,
President.

Signed for the Participating Specialty Contractors Employers' Associations:

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Signed for The Associated General Contractors of America.

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Executive Director.

W. RAY ROGERS,
President.

Signed at the WHITE HOUSE
February 2, 1965

Witnessed by
LYNDON B. JOHNSON
PRESIDENT

APPENDIX D

APPEALS BOARD

Statement of Procedures

The revised machinery for the settlement of jurisdictional disputes in the building and construction industry, as incorporated in the agreement signed February 2, 1965, provides for the creation of an Appeals Board. Article II, Section 5 states in part:

> "The Appeals Board is empowered to review and decide any appeal from a decision or ruling of the National Joint Board or a Local Board recognized under Article IV [New York, Chicago and Boston] and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary and it is authorized, subject to the approval of the Joint Negotiating Committee, to prescribe rules as to the types of cases which it will accept for review. No decision of the Appeals Board shall be considered as part of the record referred to in Article III, Sec. 1(c) of this plan. The Appeals Board shall have the authority, subject to the approval of the Joint Negotiating Committee, to establish such procedural regulations as may be required for the effective administration of this appeals procedure. . . ."

The revised procedural rules and regulations of the National Joint Board for the Settlement of Jurisdictional Disputes, as approved by the Joint Negotiating Committee, contain the following section entitled "Effect of Appeal to the Appeals Board":

> "When an appeal is taken to the Appeals Board from a job decision or interpretation of the Joint Board, such job decision or interpretation shall not take effect until the Appeals Board has acted. If the Joint Board decision or interpretation is modified or reversed, the parties to this Agreement shall immediately comply with the Appeals Board action."

APPEALS BOARD

Procedural Regulations

The Appeals Board cannot anticipate at the outset of its operations the full range of procedural questions that may arise in carrying out its functions under the revised plan for the settlement of jurisdictional disputes. Subject to the approval of the Joint Negotiating Committee, the Appeals Board presents hereinafter a preliminary statement of its procedural regulations with the understanding that they shall be reviewed and revised in the light of experience, but only in keeping with the plan dated February 2, 1965.

1. No request for consideration of an appeal from a job decision of the National Joint Board or from a recognized plan for local settlement (New York, Chicago and Boston) made after April 1, 1965 may be filed with the Appeals Board while a request for reconsideration or clarification is pending before the National Joint Board or the machinery of such recognized local plan. An appeal may be filed from a job decision or a decision on a request for reconsideration, clarification or a decision following an oral hearing. Parties may not have proceedings in process in the same case in both the Appeals Board and the National Joint Board or a recognized local board.

2. A request to consider an appeal may be filed with the Appeals Board by the following parties:

(a) International unions involved.

(b) Contractors involved or directly affected.

(c) National contractor associations with members involved or directly affected.

3. A request to consider an appeal shall be filed in writing with the Appeals Board, Plan for Settlement of Jurisdictional Disputes, Building and Construction Industry. The

address is 1012 14th Street, N. W., Room 1104, Washington, D. C. 20005 (telephone number, STerling 3-0040). Any request to consider an appeal must be filed with the Appeals Board no later than two (2) working days after the date of the decision of the Joint Board or the recognized local board. Such request shall include a copy of the decision from which an appeal is requested, a statement of the facts and a description of the work operation, with a statement of the reasons for the appeal. (The full file of the National Joint Board shall be available to the Appeals Board.)

4. In the case of any petition for an appeal filed from a decision of a recognized local board (New York, Chicago and Boston) the decision of such local board shall be placed into effect before the request for consideration of an appeal is filed. A request to consider an appeal from a decision of the National Joint Board constitutes a stay of such decision.

5. The Appeals Board shall promptly review any request to consider an appeal. It may or may not seek the views of the other involved parties before deciding whether or not to consider the appeal. The plan specifically provides that "the jurisdiction of the Appeals Board shall be discretionary. . . ." If the Appeals Board rejects the consideration of the appeal, the decision of the National Joint Board shall promptly be placed into effect. The decision of the recognized local boards shall continue in effect. The rejection of the consideration of an appeal by the Appeals Board is not to be construed as constituting any ruling on the merits of a dispute nor does it prejudice a further request for consideration of an appeal on a similar case in the future.

6. In exercising its discretion as to whether or not to accept a particular appeal, the Appeals Board will give consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolu-

tion of disputes and the improvement of relations, and the reasons advanced for considering the appeal. The Appeals Board may not be able as a matter of time to consider all requests for appeal, particularly in its early stages of operation, and accordingly must establish some priority among possible appeals. The Appeals Board is authorized, subject to the approval of the Joint Negotiating Committee, "to prescribe rules as to the types of cases which it will accept for review"; the Appeals Board may establish such types of cases in the future.

7. When the Appeals Board has decided to accept an appeal, it shall promptly set a date for the consideration of the case and notify all involved parties. The Appeals Board shall indicate the date and place of any hearing or specify other procedures it will follow in considering the appeal.

8. The decision of the Appeals Board shall be communicated to all involved parties; its decision shall be complied with at once.

9. The decisions arising from appeals handled under the procedures outlined above shall apply to the particular jobs involved in the appeal and shall not be considered as a part of the record as defined in Article III, Section 1(c) of the Plan.

10. All problems of work stoppages or procedural questions regarding assignments of work shall be handled by the Joint Board.

Local Recognized Boards

The Appeals Board requests each of the recognized local plans for settlement of jurisdictionad disputes (New York, Chicago and Boston) to provide full information on procedures and standards used in the making of decisions. The Appeals Board may seek conferences with the recognized local boards to facilitate the handling of disputes and to reduce the number of appeals.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 368

SHEET METAL WORKERS' INTERNATIONAL UNION, AFL-CIO, LOCAL UNION 17,
PETITIONER,

v.

AETNA STEEL PRODUCTS CORPORATION ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, LOCAL UNION 33

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Questions Presented

Whether under a national plan, voluntarily adopted by all the employers and unions party to this litigation, whereby comprehensive machinery is established for arbitration

and settlement of jurisdictional disputes among labor organizations, the decisions of the arbitration panel in an area admittedly within its substantive jurisdiction are subject to judicial review based on a claim that the arbitration panel violated its own procedural regulations.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Declaratory Judgment Act are set forth at pp. 1a-2a of the petition.

Statement

All parties to this litigation are also parties to an agreement entitled "Plan for Settling Jurisdictional Disputes Nationally and Locally" (National Plan) whereby certain international unions and employer associations have agreed to submit all jurisdictional disputes in the building and construction industry to the arbitration machinery of the National Joint Board for final determination binding on all parties. In the Boston area, where the instant dispute arose, the functions of the National Joint Board are performed by a Local Board subject to the appellate provisions of the National Plan (R. 143).[1] The Local Board is empowered to consider and decide cases of jurisdictional disputes and to make job assignment decisions. (Pet. 26a).[2]

On February 16, 1965, the Respondent Aetna Steel Products Corporation, a subcontractor working at the then-uncompleted Federal Office Building in Boston, assigned the work related to "movable steel partitions, convector covers,

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[1] Refers to Record Appendix filed by Petitioner in the Court of Appeals below.

[2] Refers to Petition for Certiorari filed in this Court.

pipe covers and related interior work around windows'' to the Respondent Carpenters Union (R. 4). On April 21, 1965, the Petitioner Sheet Workers Union protested to the Local Board the assignment by Aetna to the Carpenters of work on ''the installation of metal enclosures on metal Venetian blind pockets and convector covers'' (R. 15). There was no express protest on the assigned work related to these items enumerated in the protest. The Local Board decided that: ''The work in question is the work of the Sheet Metal Workers.'' (R. 6, 11, 17-18).

The somewhat ambiguous decision of the Local Board, characterized by the Court of Appeals, as both laconic and delphic, (Pet. 14a, 15a), made no mention of other work which Aetna had assigned to the Carpenters and which was related to the items enumerated in the Sheet Metal Workers protest. Nor did it resolve the Sheet Metal Workers' claims that its submission was intended to include three express items, rather than two[3], in addition to all work related thereto (R 31).

An appeal by the Carpenters Union from this decision was rejected as untimely as not having been made within two days of the decision as required under the National Plan (Pet. 34a). On June 20, the Petitioner claimed that Aetna was not assigning work pursuant to the Local Board's decision of April 27 as interpreted by the Petitioner and walked off the job in protest (R. 36). On July 2, 1965, Aetna assigned the work specifically designated in the Local Board's decision to the Sheet Metal Workers. Other work related to the disputed work was assigned to the Carpenters by Aetna (R. 8). The Petitioner Sheet Metal Workers adopted the position that the Local Board's assignment to the

---

[3] At the District Court the Petitioner admitted that its original submission was limited to two items, but that it had subsequently made it clear to the Local Board, in the absence of the Carpenters, that it was actually claiming three items. (R. 116)

Sheet Metal Workers of the specific items involved in the dispute also covered "all work in connection therewith" and that Aetna's assignment of such related work to the Carpenters violated the Local Board's award (R. 8, 31). In protest over Aetna's assignment of related work to the Carpenters, the Sheet Metal Workers again called a strike at the work project from July 15 to July 27. This strike was settled by an interim agreement with the Sheet Metal Workers Union involving a massive change in assignment of work which had not previously been in dispute (R. 32).

On July 20, 1965, while the second strike was still in progress the business representative of the Sheet Metal Workers went to the Local Board and requested it to issue a clarification of its April 27 decision. The Local Board thereupon issued a decision directing all parties to comply with the terms of the April 27 decision (R. 23-24). Pursuant to the Appeals Board Procedural Regulations whereby such decisions on requests for clarification may be appealed to the Appeals Board (Pet. 33a), the Respondents Aetna and Carpenters Union filed timely appeals (R. 24-27). The Sheet Metal Workers protested the appeal, taking the position that the Local Board's assignment of specific work should govern all related work (R. 31).

On August 12, 1965, after a hearing where all parties were represented, the Appeals Board through its Chairman, Professor John T. Dunlop of Harvard University, unanimously awarded "the unloading, distribution and installation of convector enclosures comprised of sills and front pieces and grills" to the Sheet Metal Workers. The "unloading, distribution and installation of pipe enclosures, curve window trim and base, filler pieces behind plastered columns, venetian blind pockets and metal partitions" was awarded to the Carpenters (R. 15).

Although there is no provision for rehearing of Appeal Board decisions, the Sheet Metal Workers sought and ob-

tained a rehearing. On August 31, 1965, the Appeals Board requested a prompt ruling from the Joint Negotiating Committee established under the National Plan as to the propriety of the Appeals Board's procedure in accepting the appeal. Under the National Plan the Joint Negotiating Committee must approve the Appeals Board's promulgation of rules as to the types of case it will accept for review and must approve the Appeals Board's establishment of procedural regulations (Pet. 27a). Before any ruling was made by the Joint Negotiating Committee, the Petitioner filed suit in the District Court seeking an order to compel the employer to award the work to the Sheet Metal Workers Union and to render void the Appeals Board decision of August 12, 1965. The District Court dismissed the complaint as involving a dispute over procedural regulations of the arbitration panel which should be determined by the arbitrator rather than by the Court. On appeal, the Court of Appeals for the First Circuit unanimously affirmed on the ground, inter alia, that the question of the scope of review permissible to the Board of Appeals was one of contract interpretation to be decided exclusively by the arbitrator.

Argument

There is no issue warranting review by this Court. The decision below is so plainly correct and in accord with principles of law enunciated by this Court and with the decisions of other courts that there is no reason for granting the petition. The case raises no issue of general importance.

As both the District Court and the Court of Appeals noted, this dispute was the very type of dispute which the parties had agreed to submit to arbitration. The sole question involved in this petition is whether the procedures of

the National Plan require that every aspect of a jurisdictional dispute must be detailed in the original submission to the arbitrator in order for the arbitrator to deal with the jurisdictional problem in toto and whether the arbitrator is procedurally limited to a piecemeal consideration of the jurisdictional problem without considering other integrally related aspects of the actual problem before him.

The issue is complicated by the fact that the instant arbitration agreement involves an initial submission and hearing procedure followed by an appellate procedure within the arbitration machinery. It was inevitable that the instant situation, whereby the nature of the dispute was ineptly stated by the petitioner and had materially changed in the interim between the original submission and the appellate hearing, would arise. Between the original submission to the Local Board on April 21, 1965, and the ultimate hearing before the Appeals Board on August 11, 1965, there had been work stoppages and interim reassignments of work. Moreover, the decisions of the Local Board, termed by the Court of Appeals as "laconic" and "delphic" had been an active ingredient in the expansion of the jurisdictional dispute. Additionally, the scope of the formal dispute had been further expanded by the contention of the Sheet Metal Workers Union before the Board of Appeals that its original submission to the Local Board was intended to cover not only the specific job items enumerated therein but also additional items not enumerated and "all work in connection thereto". The practical question before the Appeals Board was whether, under its appellate procedure, it must treat matters as they stood April 21, 1965, or whether its procedures allowed it realistically to recognize the intervening deterioration of labor relations and the expansion of the scope of the jurisdictional dispute in fashioning its decision. The position adopted by the Petitioner would impose the strict limitations of common law pleading long

since abandoned by the Courts on arbitration proceedings whereby only the wording of the grievance as it stood on the date of submission and as generally filed by a layman could be considered by the arbitrator. Under such an overly legalistic limitation, the arbitrator would be forced to determine issues which, due to intervening circumstances, would be of only academic interest and would be of no assistance in the furtherance of industrial peace.

There is admittedly no question but that the disputed award was of the type authorized by the agreement. (R. 46) The only question is procedural, whether the machinery to allow the Board to consider the full dispute was properly triggered by the wording of the original submission to the Local Board.

This Court has previously ruled that such questions going to the issue of the sufficiency of the manner in which a grievance or dispute was filed is for the arbitrator rather than for the Courts to decide. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543. The arbitration panel having ruled that the correct procedure had been invoked to present the substantive issue to arbitration, the courts below quite properly refused to interfere with that ruling.

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 557.

This Court by prior rulings has not only made it clear that such procedural questions are not to be decided by the courts but has affirmatively declared it the clear duty of the arbitrator to go beyond the strict limits of the particular contractual issues where necessary to fashion a realistic

judgment which will further the goal of uninterrupted production under the agreement.

> "Arbitration is the means of solving the unforeseeable by moulding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement . . ." *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574.

Such other factors as consumer interest and the efficiency and economy of operation may be considered by the express terms of the National Plan (Pet. 28a). No claim has been presented in the petition or in the courts below that the arbitrator has violated his duty to effect a peaceful settlement of the dispute consistent with the efficiency of operation or that the arbitrator exceeded the general authority

granted him to decide jurisdictional disputes. It would be quite inconsistent with this Court's concept of arbitration as having preventive therapeutic value, *Carey* v. *Westinghouse Electric Co.*, 375 U.S. 261, 272; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568, if the arbitrator were limited to a partial award knowing that, due to intervening events, it would soon be vitiated by disputes over work integrally related to the dispute. The arbitrator should not be thus placed in a position where his decision would create rather than settle labor disputes. Labor unions and employers would have confidence in the arbitration of jurisdictional disputes only if the arbitrator is empowered to exercise a knowledgable judgment over the dispute in a manner that will not invite disputes over integrally related work.

> "[A]rbitration would be a constricted, dying institution if it were limited to the definition of terms. [Courts] should allow the arbitrator to exercise the creative role his function demands always confining him within the scope of the contract." Cox, "Reflections Upon Labor Arbitration;" 72 *Harv. L. Rev.* 1482, 1512 (1959)

Accordingly, the mere fact that, in order to present a full and just determination of the dispute insofar as it concerned some work, it was necessary for the arbitrator to reassign other integrally-related work is not a sufficient basis for vacating the arbitrator's award. Indeed, in view of the inflammable labor relations at this job site, this course should be encouraged rather than condemned. Moreover, the position of the Petitioner before the Appeals Board had consistently been that the arbitrator is empowered to award jurisdiction not only over the disputed items particularized in a submission but also over all work

connected with such items. (R. 31). The Board of Appeals did no more than to accept this general principal of jurisdictional disputes and proceeded to award work connected with the particularized items.

Of course the Petitioner may disagree with the arbitrator's determination as to which work is sufficiently related to the items in the original submission so as to be covered by that submission and thus within his jurisdiction, but that is a matter going to the merits of the dispute and is clearly not a proper subject for judicial review.

> "[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599.

It is equally clear that such questions as whether metal partitions and filler pieces behind plastered columns are items sufficiently connected with the installation of metal enclosures on convector covers so as to be included in consideration of the arbitration submission may not serve as the proper basis for a Petition for Certiorari as "review would be of no importance save to the litigants themselves" and "this Court does not sit for the benefit of particular litigants". *Rudolph* v. *United States*, 370 U.S. 269, 270; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74.

The protest (Pet. 10) now emanating from the Petitioner in invoking the certiorari power of this Court, that the arbitrator's decision could disrupt the confidence parties would ordinarily place in arbitration proceedings is indeed inconsistent with the Petitioner's prior actions in engaging in two work stoppages prior to the award, particularly

when it is considered that such stoppages are prohibited by the National Plan, which the Petitioner now claims to be protecting (Pet. 30a).

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

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SHEET METAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL UNION 17,

Petitioner,

v.

AETNA STEEL PRODUCTS CORPORATION, J. W. BATESON CO., INC.,

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 33,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AETNA STEEL PRODUCTS CORPORATION AND J. W. BATESON CO., INC.

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Statement

Respondents Aetna Steel Products Corporation and J. W. Bateson Co., Inc. submit this brief in opposition to the certiorari petition of the Sheet Metal Workers International Union, AFL-CIO, Local Union No. 17.

Nature of Controversy

This action involves a dispute between two building trade unions concerning the performance of certain construction work at the John F. Kennedy Federal Office Building in Boston, Massachusetts (Federal Project).

Parties Involved

Petitioner is a local union of Sheet Metal Workers in the Boston area (R. 3).*

Respondent, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union 33 (Carpenters) is a local union of carpenters in the Boston area (R. 4).

Respondent J. W. Bateson Co., Inc. (Bateson) is the general contractor to whom the Federal Government awarded the general contract for the construction of the aforesaid Federal Project (R. 4).

Respondent Aetna Steel Products Corporation (Aetna) is a fabricator of sheet metal products to whom Bateson awarded a sub-contract for the sheet metal work at said Project (R. 4).

Arbitration Agreement

The arbitration agreement involved herein is The Plan for the Settlement of Jurisdictional Disputes in the Building and Construction Industry which was signed on February 2, 1965 at the White House in the presence of President Johnson, hereinafter referred to as the "Arbitration Plan" (R. 143, Ex. 2).

Arbitral Machinery

The Arbitration Plan established arbitral machinery which, insofar as here relevant, consisted of the Local

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* Refers to Record Appendix to Appellant's Brief in the Circuit Court of Appeals.

Boston Board and the Washington Appeals Board. The Local Boston Board was the arbitral tribunal of original jurisdiction (R. 143, Ex. 2, p. 9) and the Appeals Board was the arbitral tribunal of appellate jurisdiction (*Idem*, pp. 4-6).

Appeals Board

The Appeals Board established by the Arbitration Plan consisted of the following persons:

> An impartial umpire;
>
> Two regular and two alternate labor members selected from the general presidents or elected general officers of the affiliated unions;
>
> One regular and one alternate employer member from experienced contractor members or officers of contractor member firms;
>
> One regular and one alternate labor member from the basic trades; and
>
> One regular and one alternate labor member from the specialty trades (R. 143, Ex. 2, p. 4).

Jurisdiction of Appeals Board

The Arbitration Plan grants to the Appeals Board jurisdiction at its own discretion to review any appeal from a decision of a Local Board, jurisdiction to prescribe its own procedural rules subject to the approval of the Joint Negotiating Committee and jurisdiction to render decisions that are final (R. 143, Ex. 2, pp. 5-6).

The Dispute

On February 16, 1965, Aetna gave all the sheet metal work at this Project to the Carpenters (R. 4), following past practice and the then existing agreement between the Carpenters and the Sheet Metal Workers (R. 143, Ex. 2,

pp. 34-36). On April 21, 1965, the Sheet Metal Workers protested to the Local Boston Board claiming to be entitled, not to all the work awarded to the Carpenters, but to the "installation of metal enclosures on venetian blinds pockets and convector covers" (R. 15). After a hearing (R. 16-17) the Boston Board ruled that the work "in question" was the work of the Sheet Metal Workers (R. 17-18). On May 11th, the Carpenters appealed to the Appeals Board (R. 18-20); on May 14th, the Sheet Metal Workers objected that the appeal was untimely (R. 21-22); and on May 24th, the Appeals Board dismissed the appeal as untimely under its own procedural regulations (R. 22-23).

On July 2nd, Aetna abiding by the April 27th decision, transferred the work from the Carpenters to the Sheet Metal Workers (R. 7-8) using the identical words of the Boston Board decision, i.e., "the installation of metal enclosures on metal venetian blinds pockets and convector covers" (R. 17-18). In July 15th, the Sheet Metal Workers, although they had previously claimed only "installation," put forth a further claim for "the unloading and distribution" of the material, and called a strike (R. 8).

The strike caused a serious work stoppage at the project; it also affected other projects and even involved the National Labor Relations Board (R. 32). On July 20th, all parties except the Carpenters asked the Boston Board for a clarification of its April 27th decision (R. 8). Instead of clarifying, the Boston Board stood pat on its prior decision and on July 20, 1965 rendered its second decision reading as follows:

> "All of the parties in interest be directed to comply with the April 27, 1965 decision of the Board." (R. 23-24)

It was from this second decision of July 20th that Aetna took an appeal (R. 24-25) in which appeal the Carpenters

joined (R. 25-27). In joining, the Carpenters requested the Appeals Board to review the entire dispute, stating:

> "In view of work stoppage by Sheet Metal Workers and other crafts which has halted progress of the work on this project, we further request that this entire matter be reviewed by the Appeals Board for purpose of eliminating problems and confusion created by the Boston Board and so that work may proceed without further interruption." (R. 27)

On July 27th, in order to end the strike pending the appeal, Bateson signed a longhand written agreement (R. 104-106) giving all the work to Sheet Metal Workers "until such time" as the Boston Board's order might be reversed (R. 27-29).

On August 12th, the Appeals Board after a hearing reviewed the "confused situation" and rendered a decision giving part of the work to the Sheet Metal Workers and part to the Carpenters (R. 31-33).

On September 10th, the Sheet Metal Workers filed their complaint in the District Court (R. 1) seeking an injunction, declaratory judgment and damages (R. 3-14).

Question Presented

Whether the Appeals Board exceeded its jurisdiction under the Arbitration Plan by allocating to the Carpenters the work with respect to curve window trim and base, filler pieces behind plaster columns and metal partitions (Petition, 8)?

Argument

The jurisdiction of the Appeals Board is governed by Section 5 of Article II of the Arbitration Plan (R. 143, Ex.

2, pp. 5-6) and by the Procedural Regulations of the Appeals Board (R. 143, Ex. 3, pp. 24-27).

Section 5 grants to the Appeals Board the right to review "any appeal" from a local board and the right of "discretionary" jurisdiction (R. 143, Ex. 2, pp. 5-6).

The Procedural Regulations grant to the Appeals Board the right to hear appeals from a "clarification" decision of a local board (R. 143, Ex. 3, p. 25). They also provide as follows:

> "6. In exercising its discretion . . . the Appeals Board will give consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolution of disputes and the improvement of relations, and the reason advanced for considering the appeal." (R. 143, Ex. 3, p. 26)

The work had originally been given to the Carpenters (R. 4), in accordance with the long standing agreement between the unions stipulating that the Carpenters were to do this type of work (R. 143, Ex. 2, pp. 34-36), and in accordance with custom and past practice at various other similar projects (R. 19-20).

Aetna's work under its sub-contract included (a) convector covers comprising the window sills, front pieces, and grills, (b) pipe enclosures, (c) venetian blind pockets, (d) window trim and bases on curved windows, (e) filler pieces behind plastered columns where required, and (f) metal partition walls. These were the items given to the Carpenters by Aetna's assignment of February 16, 1965 which generally included all other "related interior work" (R. 4). Most of these items are shown on the photograph, Exhibit 19 (R. 123) and all of these items were obviously before the Appeals Board.

In their protest to the Boston Board the Sheet Metal Workers claimed only two of these items, the venetian

blind pockets and the convector covers (R. 17). At the hearing before the District Court the Sheet Metal Workers contended that three items of work were involved (R. 99), adding the pipe enclosures and indicating that a typographical error might have occurred in the writing of the protest originally filed with the Boston Board (R. 108). But even with this addition, only three items were claimed by them; the remaining items of work were never claimed by the Sheet Metal Workers; they were at all times regarded as the work of the Carpenters.

The Boston Board decision of April 27th, failed to resolve the dispute between the unions. The controversy continued, a strike was called and a serious work stoppage ensued. The situation became heated and definitive action became essential to break the impasse and to allow the work to proceed (R. 32-33).

On July 20th, in the midst of the strike, the Boston Board was given an opportunity to clarify the situation, but instead refused to take any action. It stood pat on its previous decision of April 27th and in its second decision of July 20th relegated the parties to the *status quo,* thereby perpetuating the discord (R. 23-24). It was from this second decision that Aetna appealed to the Appeals Board (R. 24-25) and in which appeal the Carpenters joined (R. 25-27).

Recognizing its duty under the Arbitration Plan and Procedural Rules, the Appeals Board stepped into this vacuum and rendered a decision which allocated the work in part to one union and in part to the other (R. 31-33).

The only dispute involved was the Aetna sub-contract for sheet metal work at this project. The only decision rendered by the Appeals Board was with respect to the Aetna sub-contract at this project. Overlooking the fact that the Sheet Metal Workers had claimed only the "installation" of the items referred to in their original protest (R. 15), the Appeals Board awarded the Sheet Metal

Workers not only the installation, but also the "unloading and distribution" of the convector covers comprising the sills, front pieces and grills (R. 33). The remainder it awarded to the Carpenters (R. 33).

Under the circumstances of all the confusion created by the actions of the Sheet Metal Workers and the serious work stoppage which already had spread to other projects, the Appeals Board properly exercised the jurisdiction which the Arbitration Plan granted to it.

The Sheet Metal Workers themselves had invoked the arbitral machinery of the Arbitration Plan. The mere fact that the Appeals Board mentioned work to be done by the Carpenters, which the Sheet Metal Workers had never claimed, violated no rights of the Sheet Metal Workers. At no time did the Sheet Metal Workers claim that they were entitled to the curve window trim and base, filler pieces and metal partitions; nor do they so claim now, except by indirect inference not based upon fact.

By adjudicating all unresolved jurisdictional questions between the two disputing unions and clarifying all the work assignments relating to the Aetna sub-contract, the Appeals Board took salutary action to end the strike. This was the very aim and purpose of the Arbitration Plan which gave the Appeals Board discretionary jurisdiction in order to allow it to adjudicate the entire spectrum of any jurisdictional dispute in the construction industry.

On the appeal from the July 20th decision of the Boston Board, the Carpenters had specifically requested that "this entire matter be reviewed by the Appeals Board for purpose of eliminating problems and confusion . . ." (R. 27). They recognized that under the Procedural Regulations the Appeals Board was fully empowered to render a full and comprehensive decision disposing of the entire controversy (R. 143, Ex. 3).

In view of a typographical error in the petition, it should be noted that in making its decision of August 12, 1965,

the Appeals Board specifically observed that it was not readjudicating the Boston Board decision of April 27th, but was taking definitive action long overdue:

> "The Appeals Board in this decision has neither entertained an appeal from the decision of the Boston Board of April 27 nor has it sought simply to interpret the decision of the Local Board of April 27 which the Local Board has refused to do. Some definitive action, however, is long overdue to determine precisely how work shall proceed." (R. 32-33)

The opinions of the Courts below (Petition Appendix B, 3a-10a and 11a-22a) carefully summarized the facts and the principles of law which are applicable here. Little need be added to what the Courts below have already stated. However, in view of the contentions now being advanced in the petition herein, a review may be helpful.

As already noted herein and by the Courts below, the Appeals Board was delegated by the Arbitration Plan a wide and all inclusive jurisdiction designed to accomplish the Plan's objective of minimizing economic losses caused by jurisdictional disputes in the construction industry. At the very least, the jurisdiction granted to the Appeals Board was sufficiently wide to allow it to determine the entire controversy between these two particular unions on this particular project. It is submitted that the Appeals Board exercised its jurisdiction soundly and wisely in this particular case.

However, irrespective of the foregoing, it has been established by the decisions of this Court that once it has been determined that a dispute is subject to arbitration, the nature and extent of the dispute and all "procedural" questions which may grow out of the dispute and bear on its final disposition are matters that should be left to the determination of the arbitrator without judicial intervention *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 557.

In the "Steelworker trilogy" (*United Steelworkers* v. *Warrior & Gulf Navigation Company,* 363 U. S. 574, *United Steelworkers* v. *American Manufacturing Company,* 363 U. S. 564, *United Steelworkers* v. *Enterprise Wheel & Car Corporation,* 363 U. S. 593), this Court noted that our National Labor Policy strongly favors the arbitration of disputes and the Petitioner's attempt now to contend that these decisions warrant the overturning of the Appeals Board's decision disregards their clear meaning.

In *Enterprise Wheel, supra,* like the instant case, the sole question presented was whether the arbitrators had exceeded their power. This Court, while refusing to review the merits of the arbitration award, observed per Justice Douglas:

> ". . . the question of the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Wheel & Car Corporation, supra,* at 599.

The very practical question of interpretation was further considered by this Court which observed that the arbitrator

> ". . . is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Id.* at 597.

The realistic need for flexibility when attempting to solve industrial disputes was also noted in *Warrior & Gulf, supra.* There, at 578, this Court observed that a collective bargaining agreement is "more than a contract;

it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." As a result, the arbitral process

> ". . . is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Id.* U. S. at 581.

And in *Warrior & Gulf, supra,* at 582, 583, this Court noted that arbitration

> ". . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

It is submitted that the Circuit Court correctly held that the decision of the Appeals Board properly applied "the common law of the shop" applicable to the dispute and should not be disturbed by judicial intervention.

Conclusion

There can be no question that the controversy between the Carpenters and the Sheet Metal Workers was subject to arbitration under the Arbitration Plan. Indeed, petitioner so conceded by itself invoking the arbitral machinery. The decision of the arbitral appellate tribunal was well within its jurisdiction and wisely and fairly disposed of the entire controversy between the conflicting parties. Under settled doctrine, no judicial intervention is warranted and the arbitral tribunal should be left to determine its own procedural questions.

The decision of the Court below was cogent and proper and in accordance with the applicable decisions of this

Court. No conflict is involved and no proper ground is presented for the granting of certiorari.

WHEREFORE, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

August 17, 1966.

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